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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1107

KENNETH R. YOTT,

Petitioner,

vs.

NORTH AMERICAN ROCKWELL CORPORATION, *et al.*,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RICHMAN, HERMAN AND TWITTY,
STUART P. HERMAN,
JOHN A. LAWRENCE,
9601 Wilshire Boulevard, Penthouse,
Beverly Hills, Calif. 90210,
Attorneys for Petitioner.

Of Counsel:
DALFORD TODD, Esq.,
1309 Main Street,
Dallas, Texas 75202.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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No. .....

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NORTH AMERICAN ROCKWELL CORPORATION, *et al.,*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, KENNETH R. YOTT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, heretofore entered in this case on August 21, 1979.

Opinions Below.

The opinion of the Court of Appeals is reported at 602 F. 2d 904 (9th Cir. 1979), and is reproduced in the appendix at pp. 1-11. Petition for rehearing was denied, and suggestion of appropriateness of rehearing *en banc* was rejected, on October 19, 1979. The denial of rehearing and rejection of suggestion of appropriateness *en banc* is reproduced in the appendix at p. 12.

The opinion of the district court is reported at 428 F. Supp. 763 (C.D. Cal. 1977), and is reproduced in the appendix at pp. 13-27. The prior opinion of the Court of Appeals remanding this case for trial is reported at 501 F. 2d 398 (9th Cir. 1974), and is reproduced in the appendix at pp. 28-41.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 21, 1979, with rehearing denied on October 19, 1979. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether speculation as to future events and admittedly normal training costs can form the nexus of undue burden and hardship on an employer and union thereby allowing them to refuse to accommodate a long-term employee's sincere religious beliefs as required by Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e)-(j).

Statutes Involved.

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000(e)-(j), provides as follows:

> "(j) the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e)-2(a)(1), provides in pertinent portion, as follows:

> "*Sec. 703* (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

Statement.

Petitioner, KENNETH R. YOTT, was employed as an office equipment mechanic by ROCKWELL INTERNATIONAL CORPORATION (hereinafter referred to as "Rockwell" or "Employer"), for approximately 22 years, from February 4, 1947, until January 14, 1969. As of the time of Petitioner's discharge, Rockwell, a manufacturer of aerospace systems including military aircraft, missiles, launch vehicles and computers, had a complement of approximately 70,000 employees. Appellee INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION 887 (hereinafter referred to as "Union"), is the exclusive bargaining agent for the bargaining unit of Rockwell employees in which Petitioner was employed. (App. p. 2.)

In January, 1969, Union's bargaining unit covered approximately 30,000 employees, and at time of trial, approximately 8,600 due to reductions in the Rockwell work force. Union dues in Petitioner's job classification were $8.50 a month in 1969 and at time of trial were $14.09.

From the date of Petitioner's employment in 1947 until October 16, 1968, the provisions of the applicable collective bargaining agreements negotiated between Rockwell and the Union did not require incumbent employees to become Union members. The 1965-1968 agreement required new hires to acquire Union membership. Effective October 16, 1968, under the 1968 Agreement, all employees in Petitioner's unit, including Petitioner, were required to either join and pay dues to the Union or tender an equivalent amount to the Union as a service fee. Petitioner refused to do so, on religious grounds, and on January 14, 1969, Rockwell, having received a demand from the Union, discharged Petitioner pursuant to the collective bargaining agreement because of his refusal to join or tender dues to the Union as mandated by the contract. (App. pp. 2-3.) At all times during his employment, Rockwell found the quality of Petitioner's work to be satisfactory, and it is not at issue in his discharge.

For approximately 40 years, Petitioner has been a member of the "Church That Is Christ's Body". One of the principal tenets of that religion is the belief that Christians in subjection to Jesus Christ should not affiliate with any group that includes non-believers. A part of that tenet is not to be a member of or affiliated with labor unionism as contrary to the Cardinal Biblical Precepts of the Scriptures. Petitioner's refusal to join and pay dues to the Union was based on these sincerely held religious beliefs. Further, Petitioner has a sincere belief founded upon the Bible that he is prohibited from paying monies to any religious or charitable source based upon the mandatory obligations of a union security clause, which payment would be under compulsion and contrary to voluntary "Chris-

tian giving" mandated by the Bible. Neither the sincerity of Petitioner's belief nor the religious nature thereof was disputed by the courts below. (App. p. 2.)

Petitioner does not challenge the status of the Union as the exclusive bargaining representative for employees in his unit, nor does he desire to negotiate his own terms and conditions of employment with Rockwell so long as the Union remains the certified collective bargaining representative. The Union stipulated that it would suffer no financial hardship if it failed to receive Petitioner's dues and that less than 20 other incumbent employees of Rockwell since 1968 have sought exception from the obligations of Union membership because of religious beliefs. It further concedes that at various times the International Union UAW and many of its affiliated Local Unions have negotiated collective bargaining agreements similar to a 1965-1968 Rockwell agreement which provide that bargaining unit employees employed prior to the effective date of the union security clause were not mandatorily required to join or pay a service fee to the Union as a condition of continued employment. Such clauses are commonly known as "Grandfather Clauses". None were limited to those with religious objections, however.

Rockwell admits that at various times between 1969 and the present there have been non-union employment vacancies at Rockwell outside Petitioner's bargaining unit which Petitioner, with normal training, could have performed, but Rockwell did not offer any of these vacancies to Petitioner. Rockwell and the Union further admit that no accommodation other than that of allowing payment to a charity in lieu of union dues has

been offered to Petitioner, either at the time of his termination or at any time prior or subsequent thereto.

Subsequent to October 6, 1968, Petitioner was given notice that he must comply with the collective bargaining requirement of Union membership and dues or service fees. (App. p. 14.) Based upon his religious convictions, Petitioner refused to comply and communicated the basis of his refusal prior to his termination to both Rockwell and the Union by a two-page letter, which was not responded to by either Rockwell or the Union. Petitioner also discussed his religious convictions with a Rockwell supervisor whose only suggestion was that he pay one month's dues ($8.50) and then quit in order to qualify for an $800.00 benefit he would then be entitled to. Petitioner responded that his religious convictions forbade any such involvement, and he was terminated on January 14, 1969. Petitioner filed timely charges with the California Fair Employment Practices Commission and the Equal Employment Opportunity Commission charging religious discrimination. (App. p. 14.) Resolution failing at the administrative level, suit was instituted in the United States District Court for the Central District of California on June 15, 1971, requesting injunctive relief and seeking Petitioner's reinstatement to his former position with Rockwell with seniority rights, back pay and salary equalization.

On November 29, 1971, Petitioner's First Amended Complaint was dismissed pursuant to Federal Rule 12(b)(6) for failure to state a claim for relief. On appeal, the case was reversed by the United States Court of Appeal for the Ninth Circuit, per Judge Barnes, and remanded for further proceedings upon the issue of availability of "reasonable accommodations"

to Petitioner's religious beliefs which did not create "undue hardship" upon either the Union or Rockwell's business. 501 F. 2d at 403. The decision was based upon the conclusion that the guidelines of the Equal Employment Opportunity Commission which predated Section 701(j) of Title VII required an attempt at accommodation of Petitioner's beliefs, *Yott v. North American Rockwell Corp.*, 501 F. 2d 398 at 403. Further, the Court of Appeals, relying on *Reid v. Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), upheld the constitutional validity of the E.E.O.C. guidelines, 501 F. 2d at 402-403, but rejected the Petitioner's claim that the union security clause of the collective bargaining agreement negotiated between Rockwell and the Union constituted an infringement of his right to the free exercise of religion guaranteed by the First Amendment to the United States Constitution. (App. pp. 34-41.)

Both prior to trial and upon trial on the remand, Petitioner proposed several accommodations which were acceptable to him in the context of his religious beliefs and which he believed would not pose "undue hardship" to Rockwell or the Union within the meaning of Section 701(j) of the Civil Rights Act: (1) that he be given a job outside the bargaining unit, or (2) that he be excepted or "grandfathered" from the application of the union security clause, or (3) that he be reinstated to his former position at a lower rate of pay commensurate with that received by others in the unit after paying their union fees. (App. p. 15.) Each of the proposed accommodations was rejected as either illegal or at best temporary due to continuing organizing efforts by the Union. (App. p. 15.) Rockwell and the Union further contended that Section

701(j) was unconstitutional as posing excessive government involvement with religion in violation of the establishment prohibition of the First Amendment, and argued that in any event, their reliance upon a document signed by the acting General Counsel of the Equal Employment Opportunity Commission (hereinafter EEOC) barred liability for any unlawful employment practice pursuant to Section 713(b) of Title VII. They proposed no accommodations other than the charity option.

The district court found each of Petitioner's proposed accommodations to be unacceptable as unduly burdensome to Rockwell and the Union, 428 F. Supp. at 769-770, after first concluding that in any event Section 701(j) of Title VII violated the First Amendment to the Constitution of the United States as prohibited establishment of religion. 428 F. Supp. at 767. (App. pp. 26-27.)

On appeal, Petitioner raised the following contentions before the Court of Appeals: (1) That the district court erred in finding Section 701(j) unconstitutional, given this Court's construction thereof in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); (2) that the district court erred in rejecting Petitioner's proposed accommodation of transfer to a non-unit position, when appropriate non-unit positions were available and transfer would not have posed any "undue hardship" to Rockwell since only normal training costs would be involved, contending further that consideration of continuing organizing efforts by Union by the district court constituted inappropriate speculation as to what might constitute hardship in the future; and (3) that a continuing exemption from union security obligations, as existed prior to the negotiation of the union security clause in 1968, would not create "undue

hardship" for either Rockwell or the Union inasmuch as Rockwell presented no evidence as to any burden created by this proposal, and Union stipulated both that it would suffer no financial hardship thereby and that fewer than twenty (20) individuals had ever sought exemption for religious reasons.

The Court of Appeals determined it unnecessary to reach the issue of the constitutionality of Section 701(j), and affirmed the decision of the District Court rejecting Petitioner's proposed accommodations of transfer to a non-unit position or exemption from union security obligations. (App. p. 2.) It is this issue with respect to which Petitioner seeks a Writ of Certiorari. Specifically, with respect to the proposal of transfer to a non-unit position, the Court of Appeals found that evidence of the Union's continuing organizing efforts at Rockwell and the training of Petitioner to fill such position rendered implementation thereof required an expense greater than "de minimus" to be borne by the Employer. Further, with respect to the proposal of exemption from union security obligations, the Court of Appeals found that exempting Petitioner "could lead to further exemptions for religious or other reasons", creating a burden to Rockwell and the Union by opening the door to further organizational efforts by the Union and by creating dissension between union and non-union employees. In so finding, the Court specifically found burden on the Union an appropriate factor to consider. (App. p. 10.)

Thereafter, Petitioner timely filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing *en banc*. On October 19, 1979, the Court of Appeals ruled that the Petition for Rehearing be denied, and that the suggestion for a Rehearing *en banc* be rejected. (App. p. 12.)

REASONS FOR GRANTING THE WRIT.

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 by adding Section 701(j), which codified prior E.E.O.C. Guidelines on Discrimination Because of Religion, *See*: 29 CFR §1605.1, setting forth a balancing test to be applied to the determination of when an employer's refusal to accommodate the religious beliefs of an employee constitutes prohibited religious discrimination violative of Section 703(a)(1) of Title VII. Under Section 701(j), the keynote consideration is whether such accommodation would create "undue hardship" for a given employer. The instant case squarely presents the fundamental issue of what may be considered in determining "undue hardship" under the "de minimus" standard mandated by this Court in *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977). Specifically, this case presents the following threefold question: (a) whether speculation as to future hardship or future events is an appropriate consideration, (b) whether normal, non-cumulative costs associated with transfer of an employee may constitute "undue hardship", and (c) whether consideration of a potential burden to a union is appropriate in this context.

The Writ of Certiorari should be granted in this case to resolve conflicts among the Courts of Appeals and among the District Courts concerning this recurring issue of what may be considered in determining the question of hardship, an issue which has not been settled by this Court. The Ninth Circuit's decision in the case at bar is in direct conflict with the decision of the Seventh Circuit in *Redmond v. G.A.F. Corporation,* 574 F. 2d 897 (7th Cir. 1978), on the issue of non-cumulative costs; and is in conflict with the decisions of the Sixth Circuit in *McDaniel v. Essex*

International, Inc., 571 F. 2d 338 (6th Cir. 1978) and *Draper v. U.S. Pipe and Foundry Co.,* 527 F. 2d 515 (6th Cir. 1976); and the Eighth Circuit in *Brown v. General Motors Corp.,* 601 F. 2d 956 (8th Cir. 1979); on the issue of consideration of hypothetical events or future hardships, and would further appear to be inconsistent with other decisions in the Ninth Circuit. *See*: *Anderson v. General Dynamics,* 589 F. 2d 397 (9th Cir. 1978); *Burns v. Southern Pacific Transportation Co.,* 589 F. 2d 403 (9th Cir. 1978).

The decision below sanctions consideration of hypothetical and speculative potential hardships in rejecting otherwise reasonable accommodations to an employee's religious beliefs, thus greatly expanding this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) where real and present hardships inured to any accommodation attempt on the part of the employer. Moreover, the reliance in the decision below upon the costs of retraining Petitioner for transfer to a non-unit position in rejecting such accommodation does not meet the "de minimus" standard posed by this Court in *Trans World Airlines, Inc. v. Hardison, supra,* in that no additional costs would be incurred by the Employer. In sum, the decision below substantially undermines the congressional purpose in enacting Section 701(j) by sanctioning the consideration of potential, hypothetical and unrealized hardships, thus allowing any accommodation, however slight, to "... rise to the level of undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level." *Brown v. General Motors Corp.,* 601 F. 2d 956 (8th Cir. 1979), quoting *Haring v. Blumenthal,* 471 F. Supp. 1172, 1182 (D.D.C. 1979).

The decision below is inconsistent with the statutory language and legislative purpose of Section 701(j), and Title VII of the Civil Rights Act of 1964, as amended, and with the persuasive case law, including the decisions of the Sixth, Seventh, and Eighth Circuits noted above. Review by this Court is essential to resolve this important issue, and to restore to Section 701(j) its intended vitality.

I.

The Decision Below Establishes a Legal Standard Inconsistent With the Decisions of Numerous Other Circuits on the Important Issue of Accommodation.

The decision below premised its rejection of the accommodations proposed by Petitioner on four basic factors. First, the court found that costs associated with retraining Petitioner for a non-unit position were greater than "de minimus", thus rendering this accommodation unreasonable as a matter of law. 602 F. 2d at 908. Secondly, the court considered both (a) potential dissension amongst unit members and (b) potential future costs of organization in its rejection of Petitioner's proposed accommodation of exemption from union security obligations. 602 F. 2d at 908-909. Finally, the court considered potential future organization of non-unit positions at Rockwell in determining that Petitioner's proposed accommodation of transfer to a non-unit position was ". . . of such temporary duration as to make the accommodation ineffectual and thus unreasonable." 602 F. 2d at 908.

Petitioner will discuss in detail at part II hereof his contention that the court misinterpreted the "de minimus" standard set by this Court in *Trans World*

Airlines, Inc. v. Hardison, supra, of transfer to a non-unit position to the extent such rejection was based upon consideration of normal, non-cumulative retraining expense. In this section, Petitioner will develop the conflict amongst the Circuit Courts created by the decision below in its reliance upon potential, speculative and hypothetical hardships created by a potential of future organizational attempts, future dissension among unit members and future organizing costs in rejecting Petitioner's proposed accommodations of transfer to a non-unit position and exemption from union security obligations.

The 1972 amendment adding Section 701(j) to Title VII of the Civil Rights Act of 1964 codified a balancing test for determining when an employer's refusal to accommodate the religious beliefs and/or practices of an employee or prospective employee violated Section 703(a)(1) of the Civil Rights Act, which test had theretofore been applied through guidelines promulgated by the Equal Employment Opportunity Commission. *See*: 29 CFR §1605.1(c). Although this case arose under an application of these EEOC guidelines, the issue of Petitioner's accommodations was considered under the application of Section 701(j), requiring reasonable accommodation of his beliefs where undue hardship on the conduct of the employer's business would not result. The specific issue upon which the decision below is inconsistent with decisions in other circuits concerns whether a finding of undue hardship may be based on speculation regarding future events or hardships which may result from implementation of an otherwise feasible religious accommodation.

Speculation regarding potential hardship which *may* be created by an accommodation has been rejected

by the Sixth and Eighth Circuits in the following decisions, respectively: Sixth: *McDaniel v. Essex International, Inc.*, 571 F. 2d 338 (6th Cir. 1978), *Draper v. U.S. Pipe and Foundry Co.*, 527 F. 2d 515 (6th Cir. 1976); Eighth: *Brown v. General Motors Corp.*, 601 F. 2d 956 (8th Cir. 1979), favorably citing *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979). It would appear that the Ninth Circuit has adopted the reasoning of the Sixth Circuit in its opinions in *Burns v. Southern Pacific Transportation Co.*, 589 F. 2d 403 (9th Cir. 1978); and *Anderson v. General Dynamics*, 589 F. 2d 397 (9th Cir. 1978), but then failed to apply it to the case at bar.

Initially, it is an employer's burden to demonstrate that accommodation will cause it undue hardship within the purview of Section 701(j). *See: Yott v. North American Rockwell Corp., supra*, 501 F. 2d at 403. With respect to the extent of the duty upon employers in this regard, this court in *Trans World Airlines, Inc. v. Hardison, supra*, held that:

> "To require TWA to bear more than a 'de minimus' cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

However, as noted by the court in *Haring v. Blumenthal*, 471 F. Supp. 1172, 1181 (D.D.C. 1979), the *TWA* decision is not dispositive of the issue where, as herein, no specific financial burden to an employer or breach of a collective bargaining agreement is presented.

While the courts have generally dealt with employers presenting discrimination complaints on the basis of

religion on a case by case basis,[1] a definite consensus, to which the case at bar presents a significant aberrancy, has been reached denying evidentiary value to hypothetical or speculative hardships which are not apparent upon review of an otherwise available religious accommodation.

The first court to comprehensively deal with the question of what showing would be sufficient to support the rejection of a proposed religious accommodation was the Sixth Circuit in *Draper v. U.S. Pipe and Foundry Co.*, 527 F. 2d 515 (6th Cir. 1976). Therein, in rejecting an employer's assertion that a proposed accommodation of substitution imposed undue hardship, the court noted that the employer's objections were speculative in nature, and commenting that "[an] employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted," went on to express

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[1]*Finding for Complainant: Cummins v. Parker Seal Co.*, 516 F. 2d 544 (6th Cir. 1975), *affirmed by an equally divided court*, 429 U.S. 65 (1976), vacated 433 U.S. 903; *Burns v. Southern Pacific Transportation Co.*, 589 F. 2d 403 (9th Cir. 1978); *Anderson v. General Dynamics*, 589 F. 2d 397 (9th Cir. 1978); cert. denied, ... U.S. ....., 99 S.Ct. 2848 (1979); *Brown v. General Motors Corp.*, 601 F. 2d 956 (8th Cir. 1979); *Redmond v. GAF Corp.*, 574 F. 2d 897 (7th Cir. 1978); *McDaniel v. Essex International, Inc.*, 571 F. 2d 338 (6th Cir. 1978); *Draper v. United States Pipe and Foundry Co.*, 527 F. 2d 515 (6th Cir. 1976); *Reid v. Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972); *Riley v. Bendix Corp.*, 464 F. 2d 1113 (5th Cir. 1972).

Finding against Complainant: Wren v. TIME-DC, Inc., 595 F. 2d 441 (8th Cir. 1979); *Chrysler Corp. v. Mann*, 561 F. 2d 1282 (8th Cir. 1977); *Jordan v. North Carolina National Bank*, 565 F. 2d 72 (4th Cir. 1977); *United States v. City of Albuquerque*, 545 F. 2d 110 (10th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F. 2d 483 (10th Cir. 1976); *Dewey v. Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970), *affirmed by an equally divided court*, 402 U.S. 689 (1971).

severe reservations with respect to "hypothetical" hardships that an employer thinks might be caused by a hardship that has never been put into practice. (527 F. 2d at 520.)

The Sixth Circuit reaffirmed this skeptical view of hypothetical hardships in *McDaniel v. Essex International, Inc.*, 571 F. 2d 338 (6th Cir. 1978), and the Eighth Circuit relied upon the Sixth Circuit position in rejecting speculation as to hardship which might result from accommodating an employee's Sabbatarian beliefs in *Brown v. General Motors Corp.*, 601 F. 2d 956 (8th Cir. 1979). In *Brown, supra*, the Eighth Circuit strongly endorsed the view of Judge Green of the District of Columbia to the effect that "undue hardship" must be held to mean *present* undue hardship, and that ". . . until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship, the employee's religious practices are required to be tolerated." *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979) as quoted in *Brown v. General Motors Corp., supra*, at 961.

The decision below wholly undermines the restraints on what may constitute undue hardship and threatens the very purpose and meaning of Section 701(j). *See;* 118 Congressional Record §§227-253 for the entire legislative history of Section 701(j). Specifically, while consideration of the possibility of an exemption from union security obligations for an employee with religious objections to Union membership was mandated under similar circumstances by the Fifth Circuit in *Cooper v. General Dynamics*, 533 F.2d 163, 170 (5th Cir. 1976); *cert. den. sub nom. Inetrnational Association of Machinists v. Hopkins*, 433 U.S. 908 (1977); this

proposed accommodation was rejected by the court below based solely upon general evidence concerning the cost of organizing a hitherto unorganized plant, concluding that "[it] was not unreasonable *to infer* in light of the facts of this case that exempting Yott *could* lead to further exemptions for religious or other reasons . . . and that fellow employees might be upset." (602 F. 2d at 909.) [Emphasis added.]

The "domino theory" underlying the analysis adopted by the Court of Appeals has been specifically rejected by each of the foregoing courts considering the issue. *See: Brown v. General Motors Corp.*, 601 F. 2d at 960-961; *Anderson v. General Dynamics*, 589 F. 2d at 401-402; *Burns v. Southern Pacific Transportation Co.*, 589 F. 2d at 407; *Haring v. Blumenthal*, 471 F. Supp. at 1182; *see also: Draper v. U.S. Pipe and Foundry*, 527 F. 2d at 520. Moreover, consideration of evidence of costs associated with organizing prior to the inception of the 1968 agreement is inappropriate when used to support speculation as to otherwise undocumented costs which might be incurred were individuals of Petitioner's religious persuasion exempted from union security obligations. In so doing, the court below has opened the door for rampant speculation as to costs which "might" be incurred by implementation of a proposed accommodation, a door which can only be closed by this Court.

As a second factor in support of its rejection of the proposed accommodation of exemption, the court below found that based on general evidence of labor unrest in prior organizing periods, ". . . exemptions are more likely to cause unrest given the history of labor relations at Rockwell . . .", 602 F. 2d at 909. However, the Court of Appeals was unable to point

to any labor unrest resulting from exemption for religious reasons, indeed, less than twenty of Rockwell's 8400 employees had ever sought such an exemption.

Again, the Sixth Circuit in *Draper v. U.S. Pipe and Foundry Co., supra,* dealt comprehensively with this issue. Therein the employer advanced the agreement that a proposed accommodation of substitution would cause "grumbling" among the complainant's co-workers. Citing *Cummins v. Parker Seal Co.,* 516 F. 2d 544 (6th Cir. 1975), the court in *Draper, supra,* held that "[the] objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, . . . such grumbling must yield to the single employee's right to practice his religion." (527 F. 2d at p. 520.)

The view of the Sixth Circuit noted above was likewise adopted by the Eighth Circuit in *Brown v. General Motors Corp.,* 601 F. 2d at 960, and can be traced directly to the guidance of this Court in *Franks v. Bowman Transportation,* 424 U.S. 747 at 775 (1976) quoting *United States v. Bethlehem Steel Corp.,* 446 F. 2d 652, 663 (2nd Cir. 1971) as follows:

> "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."

Based on the foregoing, the decision of the court below rejecting the proposed accommodation of exemption on the grounds that dissension among employees

might result, and future organizing costs might be incurred, totally undermines the standards adopted by this Court in applying the principles underlying Title VII, and is intolerably in conflict with the view of the Sixth and Eighth Circuits, and the District Court for the District of Columbia, to the effect that speculation as to future hardship based upon untried accommodations is insufficient to support a finding of undue hardship. Other than such speculation, no evidence supports rejection by the court below of the exemption accommodation.

Turning, then, to the issue of Petitioner's proposed accommodation of transfer to a non-unit position, the conclusion of the court below that this accommodation would be temporary was based solely upon general "continuing organizing attempts" of the Union, from which ". . . it could be *inferred* that the accommodation was of such temporary duration as to make the accommodation ineffectual and thus unreasonable.", 602 F. 2d at 908, again adopting a legal standard inconsistent with the otherwise overwhelming rejection of hypothetical hardships detailed above. Wholly apart from any "costs", the absence of which will be discussed in part II hereof, it was admitted that at Rockwell there were available non-unit, non-union employment vacancies which Petitioner could have performed. None of these vacancies were offered to him and no showing which would add substance to the speculation that such transfer would be only temporary, to wit, a showing of later organization of any non-unit positions, was established. Under these circumstances, reliance by the court below upon the "temporary nature" of such an accommodation constitutes absolute speculation as to future events, and is not "undue hardship", a

position which has been consistently maintained by the Sixth and Eighth Circuits.

Indeed, were Petitioner afforded the relief sought by this accommodation, as of the trial in this matter, more than eight years later, the "temporary" nature of the accommodation would not have materialized. In *Brown v. General Motors Corporation, supra,* the court noted that a suggested accommodation of substitution had, for a time, been in effect without hardship, and on this basis rejected the postulated hardship as without foundation. 601 F. 2d at 960. Quite simply, where there is no present impediment to a proposed accommodation, the accommodation must be implemented until facts or circumstances arise which negate its feasibility. *Haring v. Blumenthal, supra,* at p. 1182.

By its reliance upon hypothetical future organizational attempts in rejecting Petitioner's proposed accommodation of transfer to a non-unit position, the court below has established a standard which effectively nullifies the impact of Section 701(j), and which is inconsistent with the standard of "present" hardship otherwise required by all other courts considering the issue. The guidance of this Court is needed to put to rest the question of consideration of speculative hardship and to prevent the aberrant analysis of the court below to defeat the unanimous congressional intent underlying the enactment of Section 701(j).

II.

The Court Below Erred in Considering Retraining Costs Associated With Transfer of a Non-Unit Position to Exceed the "De Minimus" Standard Established by This Court in Trans World Airlines v. Hardison.

In its prior consideration of the implementation of Section 701(j), this Court set forth the most definitive construction of the "undue hardship" language of Section 701(j) to date. *Hardison, supra,* involved an employee whose Sabbatarian religious beliefs forbade him to perform Saturday work. When asked to perform work on Saturday to fill in for a vacationing employee, Hardison refused and was terminated for such refusal.

Hardison contended that Title VII required the accommodation of his religious beliefs against working on Saturday despite the necessity of excepting him from the provisions of a bona fide seniority system. This contention was rejected by this Court, which determined that such exception would require that other employees, with equally strong interests in having their Saturdays free, be treated unequally in derogation of their contractual seniority rights, stating that "Title VII does not contemplate such unequal treatment," 432 U.S. at 81, and that ". . . absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. at 82. The later conclusion was found by the court to be implicit in the provisions of Section 703(h) of the Civil Rights Act which provides that it is not an unlawful employment practice for an employer to ". . . apply different . . . terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are

not the result of an intention to discriminate . . .", [42 U.S.C. §2000(e)-2(h)].

However, in *Hardison, supra,* it was noted that TWA had actually attempted to accommodate the employee's religious beliefs by unsuccessfully attempting to arrange a swap shift or find another job for Hardison. 432 U.S. at 67-68, 78-80. Thus, this Court found that TWA had complied with the mandate of Title VII. In the present case, Rockwell has made no effort to test this accommodation, despite the admitted availability of non-union job positions which Petitioner could perform. As noted in Part I hereof, no showing has been made that any of the non-unit positions previously available have been usurped by union organization, so as to render this accommodation, proposed by Petitioner, unworkable.

The remaining basis relied upon by the court below in rejecting this proposed accommodation was that retraining costs associated with transferring Petitioner required the employer to incur costs greater than "de minimus". Requiring an employer to incur *extra* costs may violate the "de minimus" standard set by this Court. *See: Wren v. TIME-DC, Inc.,* 595 F. 2d 441 (8th Cir. 1979). However, where the cost would be incurred in any event and no hardship other than de minimus administrative costs[2] might be incurred, the balance set by Section 701(j) falls in favor of the affected employer. *Redmond v. G.A.F. Corp.,* 574 F. 2d 897 (7th Cir. 1978); *Brown v. General Motors Corp.,* 601 F. 2d 956 (8th Cir. 1979).

Indeed, in *Redmond, supra,* the Seventh Circuit Court of Appeals dealt specifically with the question of job

[2]The latest EEOC regulations on the issue of accommodation reject administrative costs as a basis for a determination of undue hardship under Section 701(j). Proposed 29 CFR §1605 .2(d)(1), as published September 11, 1979, (44 F.R. 53706).

transfer and the potential of costs incurred thereby, commenting as follows:

> "To pay replacement employees premium wages would not impose a cost on the defendant, for the regular warehouse employees were already receiving premium wages for their Saturday work." (574 F. 2d at p. 904.)

Similarly, in the instant case, Rockwell admits that the cost of retraining Petitioner for the available non-unit positions was "normal". In sum, the training required would be that which would be, and must have been, incurred in any event in training another selectee for the position; no additional expense whatsoever would be incurred by Rockwell. By its reliance upon such non-cost retraining in rejecting this accommodation, 602 F. 2d at 908, the court below has totally diluted the "de minimus" standard established by this Court, and in so doing has violated the express requirement set forth in *Hardison, supra,* that actual costs must be incurred by an employer to relieve it of its otherwise applicable duty of accommodation under Section 701(j).

III.

Consideration by the Court Below of Burden to the Union Is Inconsistent With the Express Legislative Mandate of Section 701(j).

Finally, the court below expressly considered burden to the Union as well as to Rockwell in rejecting Petitioner's proposed accommodations, commenting that:

> "Title VII clearly imposes the same duty not to discriminate on a union as it does the employer. Thus, it is not unreasonable to consider the burden on the union." (602 F. 2d at 909).

However, a review of the Civil Rights Act indicates that the Union lacks standing to claim that its burden in implementing proposed accommodations renders such accommodations unsatisfactory pursuant to Section 701 (j). The definitive guidance of this Court is necessary to clarify the breadth of factors which may appropriately be considered in analyzing proposed accommodations under Section 701(j).

Section 701(j) of the Civil Rights Act requires accommodation to an employee's religious observance or practice ". . . unless *an employer* demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the *employer's business.*" [emphasis added]. Unlike employers, labor organizations are not expressly granted a limitation upon their otherwise unqualified duty to accommodate the religious beliefs and practices of employees which derives from Sections 701(j) and 703(c) of Title VII. Moreover, the congressional authorization of union security clauses [29 U.S.C. §158(a)(3)] does not independently qualify the duty of a labor organization to accommodate employees' religious beliefs, *Yott v. North American Rockwell Corp.*, 501 F. 2d 398 (9th Cir. 1974); *Cooper v. General Dymanics,* 533 F. 2d 163 (5th Cir. 1976); *Anderson v. General Dynamics,* 430 F. Supp. 418 (S.D. Cal. 1977). As held by the Fifth Circuit in *Cooper v. General Dynamics, supra,* the sweep of Section 701(j) requires ". . . consideration of all reasonable accommodations of appellant's religious beliefs, *including one which permits their nonpayment of union dues or the equivalent while continuing regular work assignments with their employer* . . ." (533 F. 2d at 170) [emphasis added].

The term "employer" as used in Title VII does *not* include a labor organization in its capacity of representing employees. [Compare Section 701(b) with Section 701(d)]. Moreover, where duties, liabilities, and rights are granted to labor organizations under the Civil Rights Act, the applicability of each to a "labor organization" is expressly designated. *See:* Sections 703(c); 703(f); 703(j); 704(a); 704(b); 706 (b); 706(i); 709(c) and 709(d). No such designation of a labor organization as a recipient of the right to refuse accommodation upon a showing of undue hardship is set forth in Section 701(j). The failure to designate undue hardship is entirely inconsistent with the conclusion that hardship to a union can be considered in an evaluation of a proposed accommodation, where in all other instances the application of the provisions of the Act to labor organizations is made explicit. In a word, it is not consistent that ". . . when Congress has said A, in words which admit of neither construction nor misunderstanding, we should say A *and* B." *Cooper v. General Dynamics, supra,* 533 F. 2d at 171 (dissent of Judge Gee on this issue).

For these reasons it is submitted that the court below erred as a matter of law by considering hardship to the Union as a factor in rejecting Petitioner's proposed accommodations of transfer to a non-unit position and exemption from the bargaining unit.[3]

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[3]It is of note that in this respect that this Court's decision in *Trans World Airlines, Inc. v. Hardison, supra,* while discussing in detail hardship to TWA in accommodating Hardison's Sabbatarian beliefs, did not point to any hardship to the Union involved therein in the course of its decision, despite a lengthy discussion on the impingement of Hardison's accommodations upon a seniority system contractually negotiated between employer *and* union.

Conclusion.

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHMAN, HERMAN AND TWITTY,
STUART P. HERMAN,
JOHN A. LAWRENCE,
Attorneys for Petitioner.

Of Counsel:
DALFORD TODD, Esq.

APPENDIX.

Opinion.

PUBLISH

Filed: August 21, 1979.

United States Court of Appeals for the Ninth Circuit.

Kenneth R. Yott, Plaintiff/Appellant, vs. North American Rockwell Corporation, and International Union United Automobile, Aircraft and Agricultural Implement Workers of America Local Union 887, Defendants/Appellees. No. 78-1790.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS and ELY, Circuit Judges, and COPPLE,* District Judge.

COPPLE, District Judge:

Yott, a former employee of North American Rockwell Corp. ("Rockwell") brought this action against Rockwell and the International Union United Automobile, Aircraft and Agricultural Implement Workers of America Local Union 887 ("Local 887"), claiming that he was discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq*. The district court initially dismissed Yott's first amended complaint for failure to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded the case for further proceedings on the possibility of a reasonable accommodation to Yott's religious belief that did not cause either Rockwell

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*The Honorable WILLIAM P. COPPLE, United States District Judge for the District of Arizona, sitting by designation.

or Local 887 undue hardship. *See Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974). Upon remand and after trial, the district court declared Section 701(j) of Title VII, 42 U.S.C. § 2000e(j), unconstitutional and ruled that the accommodations proposed by Yott were insufficient under Section 701 (j). *See Yott v. North American Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977).

The issues on appeal are whether the trial court was clearly erroneous as to the conclusion that Rockwell and Local 887 could not reasonably accommodate Yott's religious convictions without incurring undue hardship and if so, whether Section 701(j) is unconstitutional. We conclude that the trial court's decision that Yott's religious beliefs could not be reasonably accommodated is not clearly erroneous and thus we affirm the decision below without reaching the question of whether Section 701(j) is unconstitutional.

Yott began working for Rockwell in 1947. During his employment he held the position of Office Equipment Mechanic. In the early 1930's, Yott became a member of a church referred to as "The Church Which is Christ's Body." One of the tenets of Yott's religion is that Christians are not to become members of or pay dues to labor unions. Another tenet is that contribution to a charitable organization must be voluntary. It is undisputed that Yott has a sincere belief in these tenets.

Prior to 1968, none of the collective bargaining agreements between Rockwell and Local 887 required Yott to join Local 887. The agreement between Rockwell and Local 887 negotiated in 1962 did include a "union security clause," but the clause only required the then members of Local 887 to remain members

to the extent of paying dues. The union security clause was expanded in the bargaining agreement negotiated in 1965 to require union dues or fees from all new employees. Then, on October 6, 1968, Rockwell and Local 887 entered into a collective bargaining agreement which contained the following provision:

> An employee who is not a member of the Union at the time this Agreement becomes effective shall become a member of the Union within ten (10) days after the thirtieth (30th) day following the effective date of this Agreement or within ten (10) days after the thirtieth (30th) day following employment, whichever is later, and shall remain a member of the Union to the extent of tendering an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union whenever employed under and for the duration of this Agreement.

Yott refused to join Local 887 or to pay union dues or their equivalent because of his religious beliefs. He so notified the defendants. Local 887 refused to waive any portion of the collective bargaining agreement and on January 14, 1969, Rockwell discharged Yott for his failure to become a member of or pay dues or the equivalent thereof to Local 887.

Yott filed a charge with the California Fair Employment Commission and with the Equal Employment Opportunity Commission ("EEOC"), alleging religious discrimination in his termination in violation of Title VII. He subsequently timely filed suit in district court. The district court dismissed Yott's complaint and the Court of Appeals in reversing and remanding the case for a determination of whether or not Rockwell and

Local 887 could make a reasonable accommodation to Yott's religious beliefs, expressly noted:

> [T]his is not a "refusal to work" case in which a reasonable accommodation is easily provided. We are not certain that any accommodation is available. If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or on the employer's business then Yott's discrimination claim should fail.

Yott v. North American Rockwell Corp., supra, 501 F.2d at 403.

Prior to Yott's termination, Rockwell and Local 887 proposed that Yott contribute an amount equivalent to union dues to a charity of his choice, including his own church. Yott rejected that proposal on the ground that it was against his religion to be required to make any charitable contribution, regardless of to whom the contribution was made. He then proposed three alternatives. First, Rockwell could provide Yott with a job outside the bargaining unit, i.e., a job which is not governed by a collective bargaining agreement requiring employees subject to the agreement to join the union and pay dues. Second, Rockwell and Local 887 could exempt Yott from the security clause in the 1968 collective bargaining agreement. Third, Rockwell could allow Yott to return to his former position at less pay.

The district court concluded that the accommodations proposed by Yott were not reasonable. It found that the proposed accommodation of a job outside the bargaining unit inadequate because evidence introduced indicated Local 887 is continuing to organize all Rockwell employees and thus accommodation would be at

best only temporary, precluding the court from finding such a proposed accommodation to be reasonable.

The district court also found that exemption could not be a reasonable accommodation in light of the constitutional validity and congressional purpose of union security clauses. The third proposal to pay Yott a wage reduced by the amount he otherwise would have had to pay to the union was found unworkable because Rockwell's payment of union dues on behalf of or for the benefit of Yott would be treated as income to Yott. Yott has only appealed the district court's decision concerning the constitutionality of Section 701(j), and its rejection of the first two accommodation proposals suggested by Yott, but not the rejection of the third proposal.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), reads in relevant part: "It shall be an unlawful employment practice for an employer (1) to . . . discharge any individual . . . because of such individual's . . . religion." The proscription against religious discrimination applies equally to a labor organization. 42 U.S.C. § 2000e-2(c). Section 701(j) of Title VII, 42 U.S.C. § 2000e(j), further provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Yott having established that he had a belief that union membership and payment of union dues were contrary to his religion, that he had informed Rockwell and Local 887 about his religious beliefs and that

he was discharged for failure to join the union or pay union dues, the burden shifted to Rockwell and Local 887. Specifically, Rockwell and Local 887 had the burden to show that they had made good faith efforts to accommodate Yott's religious beliefs, and that the efforts were unsuccessful in reasonably accommodating those beliefs without undue hardship. *See Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 401 (9th Cir. 1978); *Burns v. Southern Pacific Transportation Co.,* 589 F.2d 403, 405 (9th Cir. 1978).

The offer by Rockwell and Local 887 to permit Yott to substitute payment to a charity, including his own church, for payment of union dues constitutes a good faith effort by Rockwell and Local 887 to accommodate Yott's religious beliefs. *Cf. Burns v. Southern Pacific Transportation Co., supra* (payment of the equivalent of union dues to a charity is not as a matter of law an unreasonable accommodation proposal based on a claim of undue hardship). In fact, although it is against Yott's religious belief to be compelled to contribute to his church, he is not compelled to work for Rockwell. Yott clearly supports his religion, thus, his refusal to accept the proposed accommodation is not entirely consistent with his otherwise unrestricted support of The Church Which is Christ's Body. As stated by the Eighth Circuit Court of Appeals:

> An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an em-

> ployee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977). Thus, as this Court intimated in the previous appeal, accommodation does not appear possible.

Even though Rockwell and Local 887 have made a good faith effort to accommodate Yott's religious beliefs thereby satisfying their initial burden, where that effort is viewed by Yott as inadequate, the question becomes whether the further accommodation that Yott has requested constitutes "undue hardship." *Burns v. Southern Pacific Transportation Co., supra,* 589 F.2d at 406. In *Trans World Airlines v. Hardison,* 432 U.S. 63, 84, 97 S.Ct. 2264, 2277, 53 L.Ed.2d 113 (1977), the Supreme Court held that where the impact upon co-workers or cost of an accommodation proposal is greater than de minimus, undue hardship is demonstrated.

As indicated on the first appeal, whether Rockwell and Local 887 could make a reasonable accommodation to Yott's religious belief without undue hardship "should be for the district court to determine." *Yott v. North American Rockwell Corp., supra,* 501 F.2d at 403. The Seventh Circuit Court of Appeals has relevantly observed:

> The term "reasonable accommodation" is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances

of the individual employer-employee relationship. The trier of fact is in the best position to weigh these considerations.

We conclude that the trial court's determination of the issue of "accommodation" must be accepted unless it is "clearly erroneous," i.e., if after a careful review of the record the reviewing court is left with the definite and firm conviction that the finding is clearly wrong and that a mistake has been made.

Redmond v. GAF Corp., 574 F.2d 897, 902-03 (7th Cir. 1978).

The conclusion that the proposal to transfer Yott to a position that did not require him to be a member of a union or pay union dues was an unreasonable accommodation is not clearly erroneous. Evidence was introduced that Local 887 was continually attempting to organize all employees at Rockwell. From this evidence it could be inferred that the accommodation was of such temporary duration as to make the accommodation ineffectual and thus unreasonable. The parties also stipulated that any available jobs would require training Yott to fill the position. Training obviously involves an expense greater than that characterized as de minimus. Moreover, transferring and training Yott appears to constitute a preferential treatment over other bargaining unit employees of a substantial nature, contrary to *Trans World Airlines, Inc. v. Hardison, supra,* which held that Title VII did not require an employer to deny the shift and job preference of some employees in order to accommodate or prefer

the religious needs of others and presumably contrary to the seniority provisions of the 1968 collective bargaining agreement.

The determination that the proposal to exempt Yott was not a reasonable accommodation is also not clearly erroneous. The record indicates that prior to the 1968 collective bargaining agreement, substantial time during work was spent organizing and persuading non-union members to join. Testimony indicated Rockwell lost more than one million dollars every five years due to union organizing efforts. This expense was eliminated by the union security clause negotiated in 1968. It is not unreasonable to infer in light of the facts of this case that exempting Yott could lead to further exemptions for religious or other reasons and that Local 887 would again engage in organizational activities and Rockwell would again incur the costs connected with such effort. Moreover, exemption on its face requires such a substantial alteration in the relationship between the parties and significant erosion of the congressional purpose in permitting union security clauses that it goes beyond reasonable accommodation. *Cf. Jordan v. North Carolina National Bank,* 565 F.2d 72 (4th Cir. 1977) (proposal that employer guarantee applicant that she would never have to work on Saturday contrary to her religion spoke its own unreasonableness and thus was beyond accommodation).

Evidence also indicates that prior to the 1968 collective bargaining agreement, there was substantial ani-

mosity between union and non-union workers and that this discord was eliminated by the union security clause in the 1968 labor agreement. Thus, exemptions are more likely to cause unrest given the history of labor relations at Rockwell than otherwise. Furthermore, this is not a situation where no evidence has been submitted that there has been or is dissension among employees because some are paying the equivalent of union dues to a charity as it was in *Anderson v. General Dynamics, supra,* and *Burns v. Southern Pacific Ry. Co., supra.* Exemption involves no payment at all, and the history at Rockwell indicates friction has resulted from "free-riders" defined as those who pay neither union dues nor the equivalent thereof to a charity.

Appellant Yott has contended that the district court erred as a matter of law by weighing Yott's proposed accommodations in reference to the relative burden placed upon Local 887 in that no consideration of hardship to Local 887 is mandated by Section 701(j). Although Section 701(j) as quoted above does not expressly allow consideration of the hardship a particular accommodation proposal would have on a labor union, Title VII clearly imposes the same duty not to discriminate on a union as it does the employer. Thus, it is not unreasonable to consider the burden on the union. Even if the burden on the union were not considered as such, the findings of the district court are sufficiently supported so as not to be clearly erroneous.

Appellant Yott has further argued that in light of *Trans World Airlines v. Hardison, supra,* the findings that the proposed accommodations were not reasonable are clearly erroneous. Yott, however, has not shown nor does the record reveal that the legal standard employed by the district court differed from that adopted by the Supreme Court in *Trans World Airlines v. Hardison, supra.* Furthermore, a standard less difficult to satisfy than the "de minimus" standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine.

Because Rockwell and Local 887 made a good faith effort to accommodate the religious beliefs of Yott and because the findings that Rockwell and Local 887 could not further accommodate the religious beliefs of Yott without undue hardship are not clearly erroneous, the judgment of the district court is affirmed.

Order.

United States Court of Appeals for the Ninth Circuit.

Kenneth R. Yott, Appellant, v. North American Rockwell Corporation and International Union United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, Appellees. No. 78-1790.

Filed: Oct. 19, 1979.

Before: CHAMBERS and ELY, Circuit Judges, and COPPLE,* District Judge.

The judges constituting the panel originally concerned with the subject case (Chambers, Ely, and Copple), have voted unanimously to deny the Petition for Rehearing. Judge Ely has voted to reject the suggestion for rehearing *en banc,* and Judges Chambers and Copple have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an *en banc* hearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing *en banc* is rejected.

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*The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

Opinion and Judgment.

United States District Court, Central District of California.

Kenneth R. Yott, Plaintiff, vs. North American Rockwell Corporation and International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 887, Defendants. No. 71-1418-R.

Entered: Jan. 13, 1977.

Filed: Jan. 10, 1977.

This matter came on for trial after remand from the Court of Appeal for the Ninth Circuit, YOTT vs. NORTH AMERICAN ROCKWELL CORPORATION, 501 F.2d 398 (9th Cir. 1974).

Plaintiff KENNETH YOTT (hereafter YOTT) entered his employment with defendant NORTH AMERICAN ROCKWELL CORPORATION (hereafter ROCKWELL) in February 1947. During his employment he held the classification of Office Equipment Mechanic.

During YOTT'S employment with ROCKWELL and up to October 6, 1968, ROCKWELL and defendant INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION 887 (hereafter UNION) were signatories to a collective bargaining agreement which contained no requirement that an employee in the collective bargaining-unit (including YOTT) either be a member of UNION or pay dues to UNION.

Effective October 6, 1968, the collective bargaining agreement between ROCKWELL and UNION for the first time provided for so-called "union security" with the inclusion of Article II.

Implementation of Article II UNION SECURITY required: 1. memberhsip in UNION, or 2. the payment of dues to UNION by those employees within the bargaining-unit who did not want to obtain active membership in UNION.

After October 6, 1968, YOTT was given notice that he must comply with the collective bargaining requirement or be terminated. YOTT, claiming that religious beliefs prohibited him from membership in any union or other temporal organization or from the payment demanded by the collective bargaining agreement, refused either compliance with the terms of Article II or the contribution of an equivalent amount to a charitable or religious organization which included his own church. Pursuant to the terms of the collective bargaining agreement, YOTT was terminated by ROCKWELL on January 14, 1969.

YOTT filed charges with the California Fair Employment Commission and Equal Employment Opportunity Commission charging religious discrimination in his termination in violation of Title VII, Section 706(b) of the Civil Rights Act of 1964, as amended 78 Stat. 241, 42 U.S.C. §2000e *et seq.*

YOTT has timely filed suit in this Court requesting injunctive relief enjoining defendants from enforcing Article II of the collective bargaining agreement of October 6, 1968 (and any renewals thereof). He also seeks reinstatement to his position with seniority rights and salary at least equal to the salary he was earning on January 14, 1969.

During trial there was concession by defendants that YOTT sincerely held religious beliefs prohibiting his membership in UNION.

YOTT, for the first time at trial, suggested to defendants that he would accept as "accommodation" to his religious beliefs any one of three alternatives—1. that he be given a job outside the bargaining-unit, or 2. that he be exempted from the union security clause, or 3. he be reinstated at his old job at a lower rate of pay permitting ROCKWELL to dispose of the difference as it saw fit (presumably to pay UNION its dues for YOTT'S job pursuant to Articles II and III of the collective bargaining agreement of October 6, 1968 (and any renewals thereof)).

Defendants claim that the accommodations offered by YOTT are not reasonable because—1. they are illegal, or 2. even if legal the transfer to a non-unit job could only be temporary because of the organizing efforts of UNION. Defendants also claim that Section 701(j) violates the First Amendment of the United States Constitution.

THE CONSTITUTIONALITY OF TITLE VII, SECTION 701(j) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e(j)]

42 U.S.C. §2000e(j) provides:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.

Defendants claim that the provision of the Civil Rights Act of 1964, 42 U.S.C. §2000e(j), violates the establishment clause of the First Amendment of the United States Constitution. In answer to defendants' attack on the constitutionality of §2000e(j), plaintiff urges the Court to follow the majority opinion in Cummins v. Parker Seal Company, 516 F.2d 544 (6th Cir. 1975). The dilemma is not solved that easily. The analysis of the majority in *Cummins* (supra) does not persuasively resolve the problem nor is the majority's resolution helped by the 4-4[1] affirmance of the United States Supreme Court. Cummins v. Parker Seal Company, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976).

Religious freedom and a secular governmental approach to religious institutions are guaranteed by the First Amendment which provides in pertinent part:

AMENDMENT I

> ". . . Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The determination of whether or not §2000e(j) comports with the absolute prohibition upon Congress' power to enact laws affecting the establishment of religion requires the Court to first look at just what it is §2000e(j) does. The language of the statute enjoins an employer to "accommodate"[2] employment practices to the religious beliefs of his employee. That the Congress limited the accommodation to a "reasonable" imposition upon the employer's business is not

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[1]Justice Stephens did not participate.

[2]"Accommodate" within the context of §2000e(j) means either 1. to adapt; to make it fit, suitable or congruous; or 2. to bring into agreement or concord. Webster's Third New International Dictionary Unabridged (1967).

important when the measure of First Amendment prohibition is expressed in positive terms of "no law." Clearly then, the statute imposes on an employer the requirement that he adopt or bring into agreement his otherwise non-discriminatory business conduct with the religious beliefs of his employee. If the import of §2000e(j) can be so simply stated it is because its clear and unambiguous language leaves no other choice.

So simplistic a resolution of a serious constitutional attack may seem inappropriate in light of the majority holding in *Cummins* (supra). But *Cummins* (supra) is unpersuasive for several reasons.

The majority of the Court of Appeals in *Cummins* (supra) supports its decision as to the constitutionality of §2000e(j) by ascribing to it an adequate secular purpose when it says:

> The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment. Specifically, *the rule was designed to put teeth in the existing prohibition of religious discrimination.*

516 F.2d at 552 (emphasis added). Realistically nothing could be farther from the truth. Discrimination in employment is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(j) *et seq.*, and more particularly 42 U.S.C. §2000e-2(a)(1). No other expression of Congressional desire was and is necessary to declare unlawful a discriminatory act by an employer against an employee based upon the employee's religious belief. "Teeth" are put into the law by a comprehensive enforcement system which includes action by the Equal Employment Opportunity

Commission and the Attorney General of the United States. To guarantee effective enforcement the statutory scheme provides for a civil action by the individual employee aggrieved by discriminatory conduct of an employer. 42 U.S.C. §2000e-5(f)(1), (g)(k).[3] To ascribe, (as a majority in *Cummins* (supra) does, to the language of Senator Randolph (who proposed the amendment, i.e., §2000e(j)), a secular purpose to put teeth into such a comprehensive statutory scheme is pure sophistry.[4]

Although recognizing the distinctions which exist between the present case and the Supreme Court's decision in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168 (1971) approving the draft exemption statute, 50 U.S.C. App. §456(j), the majority in *Cummins* (supra) ascribes the rationale of *Gillette* (supra) as applicable to its decision. However, one may wish to read Gillette (supra) the rationale that would circumscribe the exercise of governmental power to conscript for national security purposes can hardly be applied to the Congressional decision that the religious beliefs of an employee are paramount to the nondiscriminatory business practice of an employer—each of whom are individually entitled to the same protection of the First Amendment prohibition against establishment of religion *and* the free exercise of the religious persuasion of his individual choice.

The conflict presented by the implementation of §2000e(j) can best be demonstrated by an example.

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[3]Relief in actions brought pursuant to these sections include injunction, reinstatement to employment, back-pay and a reasonable attorney's fee.

[4]Compare the language of Senator Randolph cited by Judge Celebrezze in his dissenting opinion in Cummins (supra), at 558.

The excuse of an employee from union membership or the payment of union dues as a condition of employment *because* of his religious objection affords that employee a privilege not otherwise available to those employees whose religious beliefs or lack of religious beliefs provide no such excuse. For instance, employee "A" may harbor political beliefs every bit as strong and compelling as YOTT'S unquestioned religious objections to union activity; yet, employee "A" cannot qualify for the required accommodation of §2000e(j) claimed by YOTT. Given the same evidence the reasonableness of the accommodation that would be required of an employer is indistinguishable between employee "A" and YOTT. The only reason ascribed by §2000e(j) for its application to YOTT and not employee "A" is religion vs. politics.

Concededly, as beauty is in the eye of the beholder, so the approach a particular Court may take to the expression of a legislative purpose can lead to opposite results. The First Amendment allows no such choice. Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment and its interpretation by the Supreme Court in Committee for Public Education

v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973).

Nor does the Supreme Court's approval of state imposed Sunday closing laws in Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed. 2d 536 (1961); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed. 2d 563 (1961); Two Guys v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed. 2d 551 (1961); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961), support the rationale of the majority in *Cummins* (supra) on the constitutionality of §2000e(j). In those cases the Supreme Court anchored its decision on the firm ground that the purpose of Sunday closing laws—though historically grounded in religious principles—has in modern times come from the clearly demonstrated state interest to provide "a uniform day of rest for all citizens." McGowan (supra) at 445. §2000e(j) demonstrates no comparable legitimate governmental purpose.

The Court finds that 42 U.S.C. §2000e(j) is an unconstitutional enactment because of its conflict with the establishment clause of the First Amendment of the United States Constitution.

Pursuant to Rule 52(a), Federal Rules of Civil Procedure, this opinion shall be deemed to be the Findings of Fact and Conclusions of Law.

The Clerk is ordered to enter judgment for the defendants together with their costs of suit.

Dated: January 7, 1977.

/s/Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Supplementary Opinion.

United States District Court, Central District of California.

Kenneth R. Yott, Plaintiff, vs. North American Rockwell Corporation, et al, Defendants. No. CV 71-1418-R.

Entered: Jan. 13, 1977.

Filed: Jan. 10, 1977.

Because this case is subject to appellate review which may or may not support the views of this Court upon the constitutionality of 42 U.S.C. §2000e(j), and in order to obviate the necessity of retrial of other issues presented to the Court this supplementary opinion is now filed.

Defendants have raised issues at trial each of which require separate determination.

1. IS DEFENDANTS' CONDUCT EXCUSED BY REASONS OF THE TITLE VII, §713(b) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-12(b)]?

Title 42 U.S.C. §2000e-12(b) provides in it pertinent part:

> §2000e-12 Regulations; conformity of regulations with Administrative Procedure Act; reliance on interpretations and instructions of Commission.
>
> (a) * * *
>
> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice

> if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, . . .

On January 26, 1967 Richard Berg, as Acting General Counsel of the Equal Employment Opportunity Commission (hereafter EEOC), published an opinion which provided in its pertinent part:

> "I do not believe it would be appropriate to read Title VII to make the enforcement of a union shop agreement a case of religious discrimination simply because the terms of the agreement impinge upon an occasional employee's religious convictions."

Mr. Berg's letter was released for publication by the EEOC to the Bureau of National Affairs (hereafter BNA) and Commerce Clearing House (hereafter CCH).[1] Both BNA and CCH published Mr. Berg's letter as an "Opinion of EEOC General Counsel," The EEOC acquiesced in this characterization of Mr. Berg's letter from 1967[2] to 1970 when the EEOC published in the Federal Register on December 9, 1970 a notice in effect withdrawing from the position stated by Mr. Berg.

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[1]Each of these publishing firms have publication services devoted to the dissemination of current legislative administrative and judicial actions relevant to specific areas of the law.

[2]The date of publication of Mr. Berg's letter.

In 29 C.F.R. §1601.30 the EEOC set forth a procedural definition of the §2000e-12(b) requirement that reliance must depend upon "any written interpretation or opinion of the Commission" by adopting two forms of commission opinion—1. a letter entitled "Opinion Letter" and signed by the General Counsel on behalf of the Commission, or 2. matter published and so designated in the Federal Register.

Measured by objective standards Mr. Berg's letter as published in BNA and CCH qualified as an EEOC opinion as delineated in 20 C.F.R. §1601.30.

Plaintiff claims that even if Mr. Berg's letter should qualify as a commission opinion, defendants had no right to rely upon it because it was not requested by or addressed to them. The simple answer to that contention is that §2000e-12(b) cannot be read to permit only an addressee[3] to be the beneficiary of commission opinion. If the shoe is 10½E, any 10½E foot may wear it. Standing to assert the defense is granted by §2000e-12(b), and the EEOC cannot by regulations or otherwise put a limitation on who can claim the section's benefits.

Plaintiff also urges upon the Court the opinion in Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971) cert. den. 404 U.S. 991 (1971) as authority that Mr. Berg's letter does not qualify as commission opinion under C.F.R. §1601.30. Plaintiff's reliance upon *Sprogis* (supra) as controlling the decision in this matter is misplaced. *Sprogis* (supra) was decided by the 7th Circuit upon factual findings not present here. The facts of *Sprogis* (supra) cannot be used

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[3]Plaintiffs claim 35 Fed. Reg. 18692 (1970), limits use of commission opinion to addressees.

to support a finding that Mr. Berg's letter does not qualify as commission opinion.

Even though the Court finds that Mr. Berg's letter qualifies as commission opinion and defendant's reliance was reasonable the inquiry cannot be concluded there. §2000e-12(b) makes the defense available against "any liability or punishment." That defense is limited to the award of damages or back pay. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1227 (1971).

Assuming for the purpose of this portion of the decision the constitutionality of 42 U.S.C. §2000e(j), YOTT may still be entitled to injunctive and declaratory relief together with costs and attorneys' fees if he should prevail upon the accommodation issues hereinafter considered.

2. ACCOMMODATION—BURDEN OF PROOF—REASONABLENESS—UNDUE HARDSHIP.

42 U.S.C. §2000e(j) provides in its pertinent part:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business.

Although not expressly stated in §2000e(j) the language appears to divide that burden of proof into two aspects.

> 1. The plaintiff has the burden of proving that he has offered to the employer an accommodation which is acceptable to him. (The employee) Yott v. North American Rockwell Corporation, 501 F.2d 398, 403 (9th Cir. 1974); and

> 2. The employer has the burden of demonstrating that the suggested accommodation will create an undue hardship.

Plaintiff has for the first time during the trial of this matter made an offer of some accommodations that would be compatible to his religious beliefs. These accommodations are—1. provide plaintiff with a job outside the bargaining unit, or 2. exempt plaintiff from the union security clause, or 3. allow plaintiff to return to his former position at less pay.

No one can deny that respect for individual religious beliefs was and is one of the most important marks of our freedom. The First Amendment guarantees freedom to believe and to practice, but it cannot measure the sacrifices which that belief and practice may require. The measure has been left to congressional vigilance and action. In matters of the conflict between employer and employee over religious beliefs the measure has been reduced to reasonable accommodation. When disagreements arise courts are given the responsibility to resolve what is and what is not reasonable.

Just as Congress has mandated reasonable accommodation of religious beliefs it has given employees and unions the right to bargain and to protect their bargains by an elaborate scheme of administrative and judicial procedures.

The task is not an easy one. The balance between the compulsion of religious beliefs and the equally precious mark of our freedom—equality under the law—is most delicate.

It is this balance the Court proposes to attempt to strike in its consideration of plaintiff's tendered accommodations.

A. NON-BARGAINING UNIT JOB.

Plaintiff offers the accommodation that he be placed in a non-bargaining unit job.

Reasonableness must be measured by the realities of the labor situation at defendant ROCKWELL'S plant. Defendant UNION has offered evidence that defendant ROCKWELL is the target of continued efforts to organize *all* employees. Other union organizations are also attempting footholds for expansion of union organizing efforts with defendant ROCKWELL.

Given these facts it would appear to the Court that accommodation would be at best only temporary. Without more the Court can make no finding that the offer of this accommodation is reasonable.

Further the Court lacks evidence of what jobs exist in the so-called "non-bargaining unit" and more importantly whether plaintiff would accept *any* of those jobs.

B. EXEMPTION FROM THE BARGAINING UNIT

Exemption is not accommodation. Exemption would require defendant UNION to forego the implementation of its statutory authority to provide for a "union shop." In *Yott* (supra) the Ninth Circuit[4] detailed the constitutional validity and congressional purpose of union security clauses. That discussion need not be repeated here. It is sufficient to say that it disposes of plaintiffs offered accommodation of exemption.

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[4]501 F.2d 398 at 403-04 (1974).

C. RETURN TO FORMER POSITION AT LESS PAY.

This offered accommodation cannot be reasonable as to defendant UNION because implementation of this accommodation could make defendant UNION subject to suit for failure to observe the fair representation requirements of the National Labor Relations Act.

For defendant ROCKWELL and for plaintiff this alternative is even more serious. As considered heretofore, any exemption from the union security provisions of the collective bargaining agreement cannot be required of defendants. To accomplish this offered accommodation defendant ROCKWELL must pay—on behalf of or for the benefit of plaintiff—union dues. This payment is income to plaintiff accountable both by plaintiff and defendant ROCKWELL under the Internal Revenue Code.

Moreover accommodation runs afoul of California Labor Code §200 *et seq.*

Any consideration of this accommodation must bring the realization that without concessions to his expressed religious beliefs plaintiff cannot make this accommodation viable.

This opinion shall be deemed to be the Findings of Fact and Conclusions of Law upon the issues presented herein as provided in Rule 52(a) Federal Rules of Civil Procedure.

Judgment shall be entered accordingly.

Opinion.

United States Court of Appeals, Ninth Circuit.

Kenneth R. YOTT, Plaintiff-Appellant, v. NORTH AMERICAN ROCKWELL CORPORATION and International Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 887, Defendants-Appellees. No. 72-1383.

July 25, 1974.

Before BARNES, TRASK and GOODWIN, Circuit Judges.

BARNES, Circuit Judge:

Plaintiff-appellant Yott asserts, in apparent good faith, that his religious precepts and beliefs prohibit his joining a union, or paying union dues.

For almost twenty-two years, prior to January 14, 1969, plaintiff-appellant had been employed by North American Rockwell Corporation (hereinafter "NR") as an office equipment mechanic. He had been a faithful and satisfactory employee.

On Ocotber 6, 1968, NR and defendant International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union 887 (hereinafter "Union") entered into a collective bargaining agreement which required all employees to pay union dues. Plaintiff refused to enter into any Union membership, or to pay any dues or their equivalent, because of his religious beliefs, and so notified the defendants. The Union refused to waive any portion of its collective bargaining agreement; NR felt required under the terms of said Union agreement to discharge plaintiff-appellant on January 14, 1969.[1] Subsequent

[1]The dismissal was required by the standard union shop clause, approved by Congress and the Supreme Court. Railway Employes' Dept. v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

to his discharge, Yott found employment with a calculator company that sends Yott to service its machines used by NR.

Plaintiff filed a charge under the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (hereinafter "EEOC"). The Commission initially found that religious objections to union-shop agreements were not protected by Title VII, but subsequently withdrew that decision. Plaintiff then filed suit in the district court, and the EEOC has indicated its support of plaintiff's position by filing an amicus brief herein.[2]

The principal issue before us is the interpretation of Section 703(a)(1) of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination because of religion,[3] and whether

[2]We note that the EEOC as *amicus* in the present case takes a position contrary to that taken in its Sixth Annual Report as brought to our attention by NR. (NR's Brief, pp. 12, 13.)

> "The Equal Employment Opportunity Commission itself has, as recently as March 30, 1972, the date it issued its Sixth Annual Report, recognized that Appellees' action of discharging Appellant was consistent both with the NLRA and Title VII. The Commission's report summarized only four of 609 charges of discrimination based upon religion. The Commission felt this decision was of such importance as to include it in the EEOC report to the President of the United States, the President of the Senate and the Speaker of the House:
>
> 'The Commission was also required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The Commission held that ". . . a union shop is not unlawful" and 'that Charging Party's refusal on religious grounds is protected by neither Title VII nor the First Amendment' 6th Annual Report, Equal Employment Opportunity Commission, p. 12."

[3]"(a) It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ."

the discharge of appellant Yott was in violation of the statutory provisions of Section 703(a)(1).

Appellant urges that before us are two questions—has the employer discriminated against the employee, and was this discrimination because of religion? If so, the Act makes it a violation. It is just that clear." (Op. Brief p. 8).

But the answers are not that easy. NR had signed a collective union agreement that included a union-shop clause previously approved both by the Congress of the United States and by the Supreme Court. (See Note 1 hereto, and § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh.)

Appellant relies on Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and attempts to distinguish Dewey v. Reynolds Metals Co., 300 F.Supp. 709 (W.D.Mich.1969), rev'd 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971). Unfortunately, both of these cases are "refusal to work" cases "involving religious holidays" as distinguished from the factual situation here.

Nor can we hold as suggested by appellant, that conscientious objector military service cases are similar. No law of the land requires plaintiff to work only at NR.

Appellant recognizes that there are cases holding against his position. International Association of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); Railway Employes' Dept. v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); Otten v. Baltimore & Ohio R.R., 205 F.2d 58 (2d Cir. 1953); Linscott v. Millers Falls Co.,

440 F.2d 14 (1st Cir. 1971), cert. denied, 404 U.S. 872, 92 S.Ct. 77, 30 L.Ed.2d 116 (1971); Gray v. Gulf, Mobile and Ohio R.R., 429 F.2d 1064 (5th Cir. 1970); Wicks v. Southern Pacific Co., 231 F.2d 130 (9th Cir. 1956), cert. denied, 351 U.S. 946, 76 S.Ct. 845, 100 L.Ed. 1471 (1956). Appellant suggests that these are all Railway Labor Act (hereinafter "RLA") or National Labor Relations Act (hereinafter "NLRA") cases.

Appellant may be right that all the cases *up to Linscott* have to do with the RLA, "allowing Union shops as to Railways." But if Congress, in its wisdom, can require railroads to have compulsory union shops, and the Supreme Court has approved and held constitutional such a requirement, it can allow and require manufacturing businesses, such as NR, to have compulsory union shops. Congress originally *permitted* such union shops, and then *required* them, and thus has given "such agreements 'the imprimatur of the federal law'." *Linscott, supra,* 440 F.2d at 16. "The federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Hanson, supra,* as quoted in *Linscott, supra,* at 16.

Whether rightly or wrongly, Union security agreements such as the one here involved, have long been favored by Congress.

The National Labor Relations Act (NLRA) as amended by the Taft Hartley Act, explicitly authorizes such agreements, Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) states in part:

> ". . . nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a

labor organization . . . to require as a condition of employment membership . . ."

The Congressional intent in allowing union shop agreements in Section 8(a)(3) is expressed by the following statement from the legislative history:

> "It seems to us that these amendments [the proviso portions of Section 8(a)(3)] remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promote stability by eliminating 'free riders' the right to continue such arrangements." S.Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 7 (1947); *See also* Int. Asso. of Machinists v. Street, *supra,* 351 U.S. at 761, 81 S.Ct. 1784.[4]

Appellant and *amicus* EEOC argue that the discharge of appellant (whose refusal to tender the periodic dues required undere the collective bargaining agreements was based on his religious convictions), constituted religious discrimination and therefore violates Title VII. In contending that the union security clauses of the RLA and NLRA are qualified or modified by the

[4]Congress has repeatedly declined to enact exceptions to the union security provisions of the NLRA. H.R. 11666, 89th Cong., 1st Sess. (1965) (To exempt persons with religious convictions from the union membership requirements of NLRA) (Referred to committee was only action taken); S.3203, 89th Cong., 2d Sess. (1966) (To protect persons conscientiously opposed to Union membership) (Defeated); S.3153, 89th Cong., 2d Sess. (1966) (Make it unfair labor practice under NLRA to require persons conscientiously opposed to union membership to join 93d Cong., 1st Sess. (1973) (Amend NLRA a union) (Defeated); and recently, S.2108, to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin) (Referred to Com. on Labor and Public Welfare). It is for Congress, which authorized union security clauses, not the judiciary, to carve out exceptions to those clauses.

provisions of Title VII, EEOC relies primarily on Norman v. Missouri Pacific Co., 414 F.2d 73 (8th Cir. 1969) (*Amicus* brief pp. 24-26) (*See also* Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970); Tipler v. E. I. duPont deNemours and Co., 443 F.2d 125 (6th Cir. 1971)), for the proposition that "Title VII shall be applied in every instance in which such application is not clearly prohibited by the other statute." (*Amicus* brief pp. 24-25). The language in *Norman* is inapposite to the issues in this case because *Norman* did not involve conduct which is explicitly permitted or authorized by the NLRA or RLA, as here.

In *Norman,* Negro train porters alleged discrimination against them by the railroad company under Title VII. The Eighth Circuit, in holding that the plaintiffs stated a cause of action held they were not confined to their administrative remedies under the RLA, but were governed by Title VII because "the plaintiffs here seek not a determination of bargaining representative but the termination by the Railroad of racially discriminatory practices respecting assignment, classification, terms and conditions of employment. These are statutory rights, not contractual rights embodied in collective bargaining agreements." *Id.* 414 F.2d at 83. The court further commented that the RLA does not concern itself with civil rights whereas the legislative intent of Title VII was toward eliminating discriminatory employment practices. Thus, *Norman's* holding was concerned with conduct not explicitly covered by RLA and the application of Title VII thereto. Similarly Title VII's application to NLRA would be in regulating conduct not explicitly regulated by the labor acts. Thus, we cannot agree that Congress's intent in Title VII

was to modify the Congressional authorization in NLRA of union security clauses as alleged and implied by *amicus*.

The final argument of appellant and also the EEOC with respect to a Title VII violation is that the appellees must accommodate appellant's religious needs unless the accommodation would be unreasonable. They cite the EEOC's Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1,[5] questioning the validity

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[5]On July 10, 1967, the EEOC promulgated "Guidelines on Discrimination Because of Religion."

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1—Observance of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodation to the religious needs of employees and prospective employees where such an accommodation can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

of the handling of the accommodation issue in Dewey v. Reynolds Metals Co., *supra* as the law in the area, and next suggest that the March 6, 1972 amendment to Title VII (Section 701(j) of Title VII as amended) codifying the accommodation section of the EEOC regulation, should be considered in interpreting Title VII's application to the appellant's discharge in 1969.

In *Dewey*, the Sixth Circuit rejected the specific regulation relied on here by the EEOC. 429 F.2d at 334. However, the same circuit has recently reconsidered the doubts that it expressed in *Dewey* about the constiutional validity of the EEOC regulation in Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972). The court in *Reid* stated that:

> "Whatever doubts there may have been about the constitutionality of this regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)." *Id.* at 350.

The Court in *Reid* went on to hold that the Supreme Court's "reasoning convinces us that 29 C.F.R. § 1605.1 (1972) was both effective and valid at the time of . . . [Reid's claimed religious discrimination]." *Id.*

In *Duke Power*, Chief Justice Burger, in his opinion for the Court discussed the "business necessity" test.

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negores cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431, 91 S.Ct. at 853.

". . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432, 91 S.Ct. at 854.[6]

On March 24, 1972, Congress amended Title VII to incorporate the substance of the EEOC Regulation 1605.1:

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Act of March 24, 1972, Pub.L. No. 92-261, § 701(j), 86 Stat. 103. (42 U.S.C. § 2000e(j)).

Although the requirement of accommodation is now a part of Title VII, there was clearly no statutory accommodation section at the time of Yott's discharge. However, as expressed in an extensive summary of the legislative history of this amendment in Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), "the regulation . . . did express the prior intention of Congress. This subsequent congressional affirmation

[6]Since we hold that if a reasonable accommodation can be reached between the parties it must be offered appellant Yott and such determination is for the District Court on remand (*infra*), we leave analysis of whether the "business necessity" test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business.

strengthens our conclusion about the validity of the regulation." 468 F.2d at 351.

Thus, we agree with *Reid* and find that accommodation is required. The question is whether or not North American Rockwell and the Union could make a "reasonable accommodation" to appellant Yott's religious beliefs "without undue hardship.' *See* 468 F.2d at 350. This determination should be for the district court to determine upon remand, and we so hold.

We note, however, that this is not a "refusal to work" case in which a reasonable accommodation is easily provided. We are not certain that any accommodation is available.[7] If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or on the employer's business then Yott's discrimination claim should fail.

The other issue with which we find it necessary to deal is appellant's contention that his discharge was an infringement on the free exercise of religion as guaranteed by the First Amendment. We are compelled to disagree with appellant's contention.

[7]We assume that appellant, because of his religious beliefs, may not desire to pay an amount equal to union dues or any other amount of money to the Union, and will still refuse to become a member of the Union.

The only succinct expression in the appellant's complaint (Tr. 107-108) and his brief (Op. Br., p. 4) concerning what constitutes appellant's objection because of "sincere religious beliefs" is that:

". . . he may not become a member of a Union or pay *dues* or *join* any other sectarian or fraternal organization." (Tr. 107-108). (Emphasis added.)

This is at least somewhat inconsistent with his statement that he does not object to "obligations imposed by Federal, State and Local governments, including the payment of taxes or compulsory military service." (Tr. 108).

Many Supreme Court and Circuit Court cases support the constitutionality of union security clauses when "minor infringements on First Amendment rights" are concerned. Int. Asso. of Machinists v. Street, *supra*; Railway Employes' Dept. v. Hanson, *supra*; Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974); Linscott v. Millers Falls Co., *supra*; Gray v. Gulf, Mobile & Ohio R.R., *supra*; Wicks v. Southern Pacific, *supra*; Otten v. Baltimore & Ohio R.R., *supra*.

In *Linscott* (which in the determination of the free exercise issue, the court was faced with the same problem as here—discharge for refusal to pay dues for religious reasons), the court found that the predominant justification for allowing such minor infringement or impairment upon First Amendment rights is the federal interest in preserving industrial peace and thus assuring the free flow of interstate commerce.

> "[2] The more difficult question is that posed by the First Amendment: whether the governmental interest expressed in the labor legislation can justify this interference with plaintiff's competing interest in choosing the employment she wishes without cost to her religious convictions. Freedom of exercise of religious is not absolute. Plaintiff concedes, as she must, that there must be a 'balancing' and that the governmental interest may be paramount if it is 'compelling.' Sherbert v. Verner, 1963, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965. The elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice. *See* Clark, Guidelines for the Free Exercise Clause,

83 Harv.L.Rev. 327 (1969); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 80 Harv.L.Rev. 1381, 1390 (1967). We turn, therefore, to an appraisal.

A strong governmental interest in the union shop was found in *Hanson*. Some employees claimed that being obliged to join the union deprived them of freedom of association as guaranteed by the First Amendment, and that compelling the payment of dues violated Fifth Amendment due process. As against these contentions the Court held that '[i]ndustrial peace along the arteries of commerce [as] a legitimate objective,' 351 U.S. at 233, 76 S.Ct. at 719, justified the legislation. Undoubtedly the Court recognized the validity and

> importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations and, as desirable for its own sake, to require a fair sharing of the costs of collective bargaining." *Id.* 440 F.2d at 17.

However, because "Hanson explicitly reserved some First Amendment questions," the court in *Linscott,* though finding such questions were not raised in *Linscott,* went on to "a balancing of the interests," the basis of Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (a state's refusal to pay unemployment compensation; *i.e.,* a matter involving the fisc). 440 F.2d at 17, 18.

The majority in *Linscott* then stated:

> "In the present case the interests are not merely that of the plaintiff versus the cost to the fisc; opposed to plaintiff's interest are both the public and private interests in collective bargaining and industrial peace.

". . . We conclude that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions, as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is plaintiff who must suffer. We agree with the Fifth Circuit. Gray v. Gulf, Mobile & Ohio R.R., n. 1, ante. *cf.* Cap Santa Vue, Inc. v. N.L.R.B., D.C.Cir., 1970, 424 F.2d 883." *Id.* 440 F.2d at 18.

Further, distinguishing *Sherbert,* the court in *Linscott* stated that:

"Furthermore, plaintiff's burden is not as severe as was Sherbert's. Her alternative is not absolute destitution. The cost to her is being forced to take employment in a nonunion [shop]—here, less remunerative employment." *Id.* at 18.

The same holds true for Yott in the case at hand. His alternatiave is not destitution but merely employment in a nonunion shop—a possibility clearly established by his own present employment.

Quoting the words of the Fifth Circuit in Gray v. Gulf, Mobile & Ohio R.R., *supra* 429 F.2d at 1065:

"We are called upon to resolve a clash between enforced union adherence and an individual conscience which forswears union allegiance."

In *Gray,* recognizing that "the constitutional issue is sensitive and perhaps far-reaching," *Id.* at 1065, the Fifth Circuit nevertheless, guided by previous Supreme Court teachings, denied relief to plaintiff. Gray, a Seventh Day Adventist, followed the religious tenets that man is a free moral agent; that he individually

must make his own decision whether or not to join a labor union, he should suffer no penalties (such as being required, whether or not a member, to pay dues or to pay the equivalent of dues to some charitable organization). *Id.* at 1066-1067, n. 4.

In *Gray,* the union suggested that he should pay the required dues and fees without actually becoming a member of the union. The court found that such an arrangement does not violate the First Amendment, *Id.* at 1072 citing *Hanson, supra,* and *Street, supra,* as dispositive of the issue. *Accord,* Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174 (6th Cir. 1972), cert. denied 409 U.S. 1028, 93 S.Ct. 464, 34 L.Ed.2d 322 (1972), in which the Sixth Circuit followed the First Circuit's decision in *Linscott* and the Fifth Circuit's in *Gray.*

The order of the district court dismissing for failure to state a cause of action upon which relief could be granted is reversed, and the case remanded for further consideration by the district court in accordance with this opinion.